



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04193/2018
HU/08225/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 16th July 2019

Decision & Reasons Promulgated
On: 12th August 2019

Before

UPPER TRIBUNAL JUDGE BRUCE
UPPER TRIBUNAL JUDGE OWENS

Between

Ronak [T]
Alpi [M] + 1
(no anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: Mr Sharma, Counsel instructed by direct access
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are both nationals of India. They are respectively a husband (born on the 23rd February 1984) and wife (1st May 1984). Mrs [M]'s dependent is the couple's young child.

The First Appellant's Appeal

2. The First Appellant Mr [T] applied on the 20th January 2018 for indefinite leave to remain on the basis that he had accrued ten years' lawful residence in accordance with paragraph 276B of the Immigration Rules. That application was refused on the 23rd January 2018 under the 'general grounds for refusal'. The Respondent invoked paragraph 322(5) of the Rules: although it was accepted that Mr [T] met the substantive requirements of 276B the Secretary of State was satisfied that there were matters arising in respect of Mr [T]'s character and conduct which meant that refusal would be conducive to the public good. Those matters were discrepancies identified by two respective government departments in respect of Mr [T]'s claimed earnings. In 2011 he had told the UVKI one thing, and HMRC another. The effect of that information was that he got further leave to remain as a Tier 1 Migrant, whilst at the same time paying minimal tax. The Secretary of State was satisfied that Mr [T] had exercised deception in giving at least one of these figures, and found that this justified refusal.
3. Mr [T] appealed to the First-tier Tribunal. In a determination dated the 16th October 2018 the First-tier Tribunal (Judge Mayall) dismissed the appeal, finding that Mr [T] had given evidence that was neither honest nor credible. Judge Mayall concluded that paragraph 322(5) was engaged and upheld the Secretary of State's reasoning.
4. Mr [T] appealed to the Upper Tribunal. Permission was granted on the 17th December 2019, in limited terms, by First-tier Tribunal Judge Boyes.
5. On the 18th January 2019 Mr [T] applied to renew his application for permission to the Upper Tribunal on all remaining grounds, and requested that the application be dealt with in oral hearing. Permission was granted on the 13th March 2019 on all remaining grounds by Upper Tribunal Judge Canavan.

The Second Appellant's Appeal

6. For reasons unexplained Mrs [M] was not included in the application made by her husband on the 20th January 2018. Rather she waited until after he had been refused before making her own human rights claim, on the 29th January 2018.
7. That application was refused on the 21st March 2018.
8. Mrs [M] appealed to the First-tier Tribunal and the matter came before Designated Judge of the First-tier Tribunal Shaerf. An application was made for Mrs [M]'s appeal to be joined with that of her husband. By this time that appeal had already reached the Upper Tribunal, and so could not be joined. Between them Judge Shaerf and Mrs [M]'s representative reached the very pragmatic compromise that her appeal would be determined in line with the decision of Judge Mayall in respect of Mr [T]. The appeal was accordingly dismissed.

9. Permission to appeal to the Upper Tribunal was refused on the 16th November 2019 by First-tier Tribunal Judge MacDonald, who quite justifiably thought there to be nothing wrong with the decision of Judge Shaerf. On the 13th March 2019, upon renewed application, Judge Canavan made an order that Mrs [M]'s appeal was to proceed in the Upper Tribunal on the condition that it be joined with that of her husband. The parties agreed that the eventual outcome in her appeal was now wholly dependent upon that of her husband.

The Grounds

10. The Appellant's contend that the decision of Judge Mayall is flawed for the following material errors of law:
 - (i) A failure to identify and direct himself to relevant *burdens* throughout the determination in accordance with the decisions in SM & Qadir (ETS -evidence - burden of proof) [2016] UKUT 229 (IAC), Muhandirange (section S-LTR 1.7) [2015] UKUT 675 (IAC). The proper approach was for the Tribunal to first consider whether the Secretary of State had discharged the evidential burden of proof, then to consider whether the Appellants had advanced an innocent explanation for the issue identified, and finally to determine whether the Secretary of State had discharged the overall legal burden of proof in showing conduct such that a refusal under 322(5) was appropriate.
 - (ii) A failure to identify and direct himself to the relevant *standard* of proof in respect of the Appellant's 'innocent explanation' in accordance with Shen (paper appeals - proving dishonesty) [2014] UKUT 236 (IAC). In that case Mr Justice McCloskey held that such explanations only need to meet a "basic level of plausibility". It is submitted that the Tribunal in fact imposed a high standard of proof on the Appellant.
 - (iii) Errors of Fact. The Appellant submits that the decision is unsafe for various errors of fact.
 - (iv) Failure to conduct an assessment of whether the behaviour identified justifies refusal under paragraph 322(5).

Discussion and Findings

Grounds (i) and (ii): The burden and standard of proof

11. We consider these grounds together because that is how the parties approached them in their submissions.
12. In SM & Qadir the then President of this Tribunal endorsed a three-stage approach where the Secretary of State makes an allegation of fraud or deception - in that case in the context of the use of proxy test takers. The three stages are:

- (a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is *prima facie* deceitful in some material fashion.
 - (b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.
 - (c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's *prima facie* innocent explanation is to be rejected.
13. This, the veritable boomerang of the burden of proof, is what in Mr Sharma's submission, First-tier Tribunal Judge Mayall failed to appreciate. The findings start with the sentence: "I regret that I did not find the appellant's evidence to be honest or credible". Mr Sharma questions how that conclusion - the exercise required at stage (c) - can lawfully be reached without having first considered stage (a) and matter (b). He further submits that all that the Appellant need do at (b) would be to provide an explanation which satisfies the "minimum level of plausibility", and contends that the Appellant was here held to a more exacting standard.
14. We accept that under the heading 'My Assessment of the Evidence' the First-tier Tribunal has not set out this three stage process in terms. It nowhere reaches a formal conclusion that the Secretary of State had discharged the evidential burden at stage (a) by pointing to the discrepancy of £14,000 between the amount declared for tax, and the claimed income relied upon in order to obtain further leave. Nor does it pause to make findings on whether the Appellant, in blaming his accountant, has discharged the relatively low burden imposed upon him at stage (b). It would indeed have been helpful if the 'veritable boomerang' had been set out more clearly. We are not, however, satisfied that this failing is in any way material, for the following reasons.
15. First, a determination must be read as a whole. It is the composite reflection of the Judge's deliberations. At paragraph 45 we find this self-direction:

"It is common ground that the appellant met all of the requirements of the rules save for the provisions of paragraph 276B(i) and (iii). In relation to 276B(iii) it is said that he fell foul of the general grounds for refusal set out in paragraph 322(5). It is also clear that the burden of proving failure under 276(i) and under 322(5) lies on the Respondent. The standard of proof is the balance of probabilities but I bear very much in mind that where, as here, the allegation against the appellant is of serious wrongdoing (in effect dishonesty) the more cogent the evidence will have to be to satisfy me to that standard".
16. We are satisfied, having regard to this passage, that the First-tier Tribunal was aware of the task before it. We should be slow to criticise it for failing to follow its own

direction, unless there is very obvious deviation from it once it begins to express its conclusions.

17. We find no such obvious deviation. In particular we note that Mr Sharma was not able to point to any part of the decision where the Judge has expressed himself in a manner that indicates that he misapplied the relevant burden and standard.
18. Second, because it is uncontroversial that the discrepancy existed, and that the Secretary of State had identified it. In Balajigari v Secretary of State for the Home Department [2019] EWCA Civ 673 the Court of Appeal held that this in itself was sufficient to discharge the initial burden imposed at stage (a) to identify a matter raising *suspicion*: see paragraph 42. Each party was aware of that, so it is understandable that the Tribunal failed to explicitly set that out.
19. Third, because what is apparent from the reasoning overall is that from paragraph 50 onward we find the composite assessment of stage (c). Here the Tribunal gives detailed and careful attention to the Appellant's evidence, itself a reflection of stage (b). His explanation is rejected for a number of reasons:
 - (i) It is inherently improbable that a qualified chartered accountant would erroneously inflate the figure of £321, claimed by the Appellant in expenses, to £14,321;
 - (ii) The Tribunal did not accept that an accountant would send off a tax return without having his client check and sign the document first;
 - (iii) It is implausible that the Appellant, had he been asked to check it, would have failed to notice the considerably reduced tax liability;
 - (iv) It is difficult to see how such an error could have been made;
 - (v) The Appellant now states that in actual fact he only intended to claim expenses of £321 in his 2011 tax return, and that he has subsequently declared this figure to HMRC. The Tribunal found it to be wholly implausible that this could have been his actual expenses for running a business over the period of a year, particularly where the Appellant's clients were all over the country and he was required to travel. Even if that were not the case and all of the work was done from home, the 600 hours of claimed work in that year would have generated more expenses than that once one takes into account internet charges, use of home as office etc.
 - (vi) The claimed expenses of £321 are further shown to be false because they do not include the accountancy fees;
 - (vii) In assessing the oral evidence the Tribunal was given the distinct impression that the Appellant was making it up as he went along;
 - (viii) The Appellant's accounts for a four month period in 2010-2011 show an expense claim of £321. It is therefore totally implausible that this would be the same figure for the whole year;

- (ix) The Appellant's claim to have undertaken 600 hours of self-employed work over the year was utterly implausible given that he also had a full time employed position at the time;
 - (x) The explanation offered by the account is simply that the additional £14,000 in claimed expenses was inserted into the Appellant's tax return in a "typographical error". The Tribunal finds this to be singularly lacking in detail, and notes that no explanation has been offered as to who made the error, why it was made and how no-one, including the Appellant himself, picked it up;
 - (xi) The accountant was not called, despite the Appellant being well aware of the issues;
 - (xii) The 2011 tax return was amended in early 2016, shortly before the application was made for indefinite leave to remain. The Appellant denied any connection between those two events and states that he uncovered the mistake when he was collating documents in order to apply for funding for a new venture. The Tribunal found that it was not immediately apparent why or how the mistake would have been uncovered in those circumstances, and concludes that the timing is suspicious;
20. Whether one reads those reasons as a rejection of the Appellant's "innocent explanation" or a positive finding that the Respondent has discharged the overall burden of proof, the outcome is the same.
21. We should add that although not pleaded in the grounds, in his oral submissions Mr Sharma contended that the Appellant had not had a fair hearing, applying the principles in Khan and Balajigari. He submitted that before a final decision was reached, fairness required that the Appellant be put on notice of the case against him, so that he may be given an opportunity to state his case. As support for his contention that this has not happened here, he pointed to paragraph 60 of the determination, where the Tribunal rejects the Appellant's evidence that he uncovered the error in 2015 whilst sorting out his paperwork for a loan application. Mr Sharma submits that had the Judge's concern been put to the Appellant, he would have been able to produce paperwork from the bank confirming that items such as previous tax returns were indeed required.
22. We wholly reject the submission that the Appellant has somehow been deprived of a fair hearing, or an opportunity to state his case. The principles set out by the Court of Appeal in Balajigari were in the context of a decision of the executive, with far reaching consequences for the individual, being made without notice to that individual. By contrast this individual is well aware of the case against him, because it has been spelled out with clarity in the Respondent's refusal letter. He then had the opportunity to provide his side of the story, and meet the forensic challenge, in a full merits-based review in this statutory appeal.
23. Properly understood Mr Sharma's complaint is that on that particular issue, the Judge did not tell the Appellant that he regarded the timing as suspicious: there was no representative for the Respondent at the hearing so no cross examination was

conducted on the point. We are satisfied that nothing turns on this. As we have said, the Appellant was well aware of the case against him, and that the Respondent regarded the retrospective amendment to the HMRC figures to be suspicious. If he had documents from the banks in 2015 demonstrating that he needed to show them his 2011 tax return, and it was his case that it was this requirement that led him to uncover the error, then he should have submitted them in the evidence before the Judge. They were, on his case, plainly relevant. It is a matter for the Appellant how he wishes to conduct his appeal.

24. Accordingly we are not satisfied that there was any material error in the overall approach taken by the Tribunal. The Appellant's appeal, insofar as it relates to the deception findings, now rests of ground (iii), that there were errors of fact in the determination capable of rendering those overall findings unsafe.

Ground (iii): Errors of Fact

25. The first 'error' identified by the grounds is in reality simply a disagreement with the reasoning. As we note above, the Appellant had laid the blame for the erroneous figures supplied to HMRC in 2011 at the door of his accountant, who had duly produced a letter accepting responsibility. The First-tier Tribunal found it to be implausible that a qualified accountant would submit a tax return without having it approved by his client. The grounds characterise this as an 'error of fact' on the basis that "this is a common occurrence as is seen by the Tribunal in many cases involving this issue". In our experience, it isn't. Most accountants do ask their clients to check and sign the tax returns prepared by them in draft, for the simple reason that this is a fundamental part of their job. In our view it was manifestly open to the Tribunal to find that element of the evidence to be implausible.
26. The second error alleged is that the Tribunal misunderstood at its paragraph 53 the Appellant's evidence in relation to his business. The grounds read: "as an education-based business his work schedule followed a syllabus-timetable and therefore work was undertaken over a 12- month period but only billed over a four month period". At the hearing we put Mr Sharma on notice that we did not understand that pleading. He sought to expand upon it by stating that the Appellant was a private tutor at the time, and that he provided services to clients throughout the educational year but only billed them when 'projects were complete'. What projects a private tutor might have been completing was not explained. Nor did it appear to be consistent with the usual practice for private tutors, to bill clients by the hour. Nor, as Judge Owens pointed out, did it appear to be consistent with the evidence recorded at paragraph 56 of the determination that some of the invoices related to work that had not yet been completed. We are satisfied that nothing turns on this alleged error, because the explanations offered were inconsistent, and implausible.
27. The third error of fact is said to be that the Tribunal were wrong to say that the Appellant had apparently paid nothing in accountancy fees. We accept that here the Tribunal does appear to have overlooked the fact that the accounts themselves show £200 claimed for 'accountancy fee'. This raises the additional problem of making the

claimed figure of £321 for an entire year of expenses even less likely to be true. The remainder of the figure, according to the accounts, comprised £36 for postage and stationary and only £85 in travel and subsistence for a job that allegedly took the Appellant all over the country. As the Tribunal rightly notes, nothing is claimed for use of home as office, telephone, internet etc.

28. Even if the Tribunal overlooked the £200 for accountancy fees mentioned in the accounts, we are not satisfied that this error in itself is capable of infecting the overall conclusions.

Ground (iv)

29. The original grounds as pleaded to the First-tier Tribunal asserted that the Tribunal had failed to make a final, global assessment of whether any deception, if alleged, would justify refusal under 322(5). We firmly reject that contention. The determination takes into account all the factors that would weigh against invoking that general ground for refusal: the Appellant has lived in this country for a long time, he now runs a business employing others and with a high turnover, his child has been born and brought up here, and another child tragically died and is buried here. It cannot therefore be said that the Tribunal failed to undertake a comprehensive assessment of the evidence in accordance with Article 8. Nor can it rationally be argued that the deception was not a serious enough matter to warrant refusal. As the First-tier Tribunal puts it:

“I regard the conduct in this case as being extremely serious. It is conduct which strikes at the very heart of the system of immigration control. Without the deceptive conduct he would not have had further leave to remain and would not have established any grounds for indefinite leave to remain on the basis of long residence. It would, without more, seriously undermine the public interest in maintaining effective immigration control if persons were able to take advantage of periods of leave which had been obtained by such conduct.

Absent the deception he would not have had the opportunity of building up a business in the United Kingdom. It is because of the deception that he was allowed to remain and to forge the successful business. It is, in those circumstances, difficult to give much weight to the scales to set against the conduct.

...

In this case the public interest in maintaining effective immigration control is extremely strong. I take into account the matters set out above. I also take into account the distress that I have no doubt will be caused by the family having to leave the burial place of the first child. I do not discount that factor at all. Given the strength of the public interest in maintaining effective immigration control however, I am satisfied, in the circumstances, that the decision was entirely proportionate”.

30. That is reasoning with which we would respectfully agree.

Decisions

31. The determination of the First-tier Tribunal contains no material error of law and it is upheld.
32. We were not asked to make an order for anonymity and in the circumstances we see no reason to do so.

Upper Tribunal Judge Bruce
24th July 2019